

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

POLYTECHNIC INSTITUTE OF
NEW YORK UNIVERSITY

Employer

Case No. 29-RC-12054

and

INTERNATIONAL UNION, UNITED AUTOMOBILE,
AEROSPACE, AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW (UAW)¹

Petitioner

DECISION AND ORDER

Polytechnic Institute of New York University (“the Employer”), is a private institution of higher education specializing in engineering. On May 5, 2011, International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW (“the Petitioner”), filed a petition under Section 9(c) of the National Labor Relations Act, seeking to represent a unit of approximately 555 Research Assistants

¹ While the Petitioner asserts that its name is “International Union, UAW” its constitution reveals that its full and correct name is “International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW.” The record showed that the name in the constitution has not been amended or changed. NLRB Case Handling Manual Section 11198.1 provides that when a labor organization requests to use a shortened name, the party should be made aware that the Board requires the correct and complete name of the petitioner together with any initialed or shortened name. The Board has a practice of allowing the preferred shortened name to appear on a ballot in parentheses in addition to the formal full name of the union. Dr. Pepper Bottling Company, 228 NLRB 1119 (1977). The case cited by the Petitioner in its brief, The Humane Society for Seattle/King County, 356 NLRB No. 13 (2010), is inapposite as the petitioner therein told employees they would be represented by a completely different union than the union that appeared on the ballot, thereby creating confusion among the electorate. Such is not the case here.

The Board has found that the full and correct name of a labor organization, including its affiliation, is a material issue that can have an impact on an election. See for example The Woods Quality Cabinetry Company, 340 NLRB 1355 (2003). Although I am not directing an election, in the event the Board reverses my dismissal of the petition, it is important that the ballot reflect the complete and correct name of the Petitioner, along with its shortened name. Accordingly, the Petitioner’s name shall appear as “International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW (UAW).”

("RA"), Teaching Assistants ("TA"), and Graduate Assistants ("GA") employed by the Employer at its New York City metropolitan facilities.

The Employer contends that the students in the petitioned-for classifications are not statutory employees under the Board's decision in Brown University, 342 NLRB 483 (2004). The Employer further posits that the Research Assistants supported by funding from external grants are not employees under the Board's decisions in Leland Stanford Jr. University, 219 NLRB 621 (1974) and New York University (NYU I) 332 NLRB 1205 (2000), regardless of the Brown decision. Lastly, the Employer asserts that the Teaching Assistants and Graduate Assistants are temporary employees and thus have no right to collective bargaining under the Act. The Petitioner takes the position that the students in the petitioned-for classifications are statutory employees and that the Board's decision in Brown should be overturned as it is inconsistent with the language of the Act and with case precedent. With regard to the Research Assistants working on external grants, the Petitioner contends that the facts of the instant case are distinguishable from those of Leland Stanford, and the Research Assistants involved herein are statutory employees because they in fact perform work for the Employer. The Petitioner asserts that the Graduate Assistants and the Teaching Assistants are not temporary employees.

A hearing was held before Kate Anderson, a Hearing Officer of the National Labor Relations Board, regarding the petitioned for unit's status as statutory employees. In support of its position, the Petitioner presented UAW employee Theodore Fang, Sujit Purushothaman, a PhD student, Harold Han, a PhD student, and Jan Carlo Bonilla, Director of the Graduate Center and Graduate Enrollment Management. In support of its position, the Employer presented Kurt Becker, Associate Provost for Research and PhD programs, Walter Zurawsky, Associate Professor of Chemical and Biological Engineering, Bruce Garetz, Head of the Department of Chemical and Biological Sciences, and Suong Ives, Director of Human Resources.

Pursuant to Section 3(b) of the Act, the Board has delegated authority in this proceeding to the undersigned Regional Director.

For the reasons set forth below, I conclude that the Research Assistants, Teaching Assistants, and Graduate Assistants are not statutory employees under the Act pursuant to

the Board's holding in Brown, which remains controlling law on the issue of student employees. Accordingly, the petition is dismissed.

BACKGROUND

1. The Employer's Operations

The Employer is the nation's second oldest private engineering institution. According to the Employer, its mission, in part, is, "To excel as a leading high-quality research university engaged in education, discovery and innovation with social, intellectual and economic impact in the New York Region, the nation and the world."

The Employer grants both undergraduate and graduate degrees. The Employer offers the degree of Bachelor of Science in 16 disciplines. The degree of Master of Science is offered in 11 disciplines. To earn a Masters degree, the student must complete at least 30 credits of course study and/or research. A degree in Master of Engineering in Interdisciplinary Studies is offered with different concentrations. The degree of Doctor of Philosophy is offered in 11 disciplines. To earn a PhD, students must complete about 75 credits,² 21 of which must be research credits. The student must then pass a qualifying examination after their first or second year, and then present and defend a thesis to a dissertation committee. The student body includes more than 1,500 undergraduate students, and 2,400 graduate students. The Employer employs about 400 full-time non-teaching staff, and about 120 full-time teaching faculty members.³

The Employer is made up of 11 academic departments: Chemical and Biomolecular Engineering, Chemical and Biological Sciences, Civil Engineering, Computer Science and Engineering, Electrical and Computer Engineering, Financial and Risk Engineering, Humanities and Social Sciences, Mathematics, Mechanical and Aerospace Engineering, Physics, and Technology Management. In addition to these departments, the Employer's researchers work through several research centers and institutes including, Center for Advanced Technology in Communications (CATT), Center for Risk Engineering, Institute for Mathematics and Advanced Super-Computing (IMAS), Manhattan Location Institute for Technology and Enterprise (ITE), National Science Foundation Industry/ Institute Cooperative Research Center Biocatalysis and

² This includes the 30 Master's credits.

³ The Employer also employs adjunct faculty but the number is unclear.

Bioprocessing of Macromolecules (NSF-BBM), Herman F. Mark Polymer Research Institute (PRI), Urban Utility Center (UUC), Wireless Internet Center for Advanced Technology (WICAT), BEST Incubator and Intellectual Property.

The Employer's main campus is located at 6 Metrotech Center in Brooklyn, New York. The Employer has other campuses in Melville, New York, Hawthorne, New York and one location in New York, New York.

The Employer currently has two unions representing certain of its employees: Local 153, Office Professional Employees International Union, that represents office clerical employees, and Local 30, International Union of Operating Engineers which represents maintenance employees. Faculty members are not represented by any union.

2. Relationship to New York University⁴

On or about July 1, 2008, Polytechnic Institute and New York University ("NYU") entered into an affiliation agreement.⁵ The parties' goal is for Polytechnic Institute of New York University (or the Employer) to become a school of New York University, more precisely a school of Engineering and Applied Sciences. The transition to becoming a school of New York University could take anywhere from 5 to 10 years to complete. There are certain criteria that the Employer must satisfy before it can become a school of NYU.⁶ It is not certain that the Employer will become a school of NYU. In fact, there is a possibility that the affiliation will not ultimately lead to a merger. The affiliation agreement created a corporation of which NYU is the only member. The parties continue to maintain their own presidents, provosts, administrative and academic structures and are thus independent of one another. The parties to the affiliation agreement continue to file their own taxes and retain separate tax identification numbers.

⁴ In Case No. 2-RC-23481, the Graduate Student Organizing Committee/United Auto Workers ("GSOC/UAW") recently filed a petition to represent certain graduate and research assistants at New York University in New York, New York. The Regional Director for Region 2 dismissed the petition under the Board's holding in Brown University, 342 NLRB 483 (2004). The petitioner therein requested review and the Board granted the request, directing that a hearing be held to develop a record on various issues. Of those issues, only two have applicability to the case herein: the issue of research assistants working on external grants and whether they may be excluded from any determined unit based on the Board's decision in New York University, (NYU I), 332 NLRB 1205 (2000); and whether the decision in Brown should be reconsidered.

⁵ That agreement was not made part of the record.

⁶ What constitutes this criteria is unclear from the record.

THE PETITIONED-FOR UNIT

The Petitioner seeks to represent “All Research Assistants,⁷ Teaching Assistants, and Graduate Assistants employed by the Employer at its New York City metropolitan area facilities, excluding all other employees, guards and supervisors as defined in the Act.”

In general, the term Graduate Assistant refers to an individual working toward a Masters Degrees. Of the roughly 2,400 graduate students, 2,000 of them are seeking a Masters Degree. The term Teaching Assistant refers to an individual working toward a PhD who assists in undergraduate lab experiments during the first year of their PhD course of study. The term Research Assistant refers to PhD candidates who are engaged in research projects in connection with their dissertations funded by grants secured by faculty members.

a. Graduate Assistants

In the fall of 2010, the Employer launched the Graduate Student Employment and Training Program (“GSET”). According to the August 16, 2010 launch memo, “The GSET program is an extensive offering that not only provides on-campus employment opportunities, but also offers training for graduate students to strengthen the professional skills necessary for successful future employment.”⁸ Jan Carlo Bonilla, Director of the Graduate Center and Graduate Enrollment Management, explained that the Employer realized that although the Masters students were ready intellectually for the job market upon graduation, many were unprepared socially. Therefore, GSET was set up to be a “grooming experience” for Masters students’ entry into the workforce. For the spring semester 2011, about 450 Masters students worked in GSET positions.

Graduate Assistants (“GA”) work in all departments. GSET offers Masters Students two employment tracks: academic (Graduate Academic Experience) and administrative (Graduate Service Experience).⁹ Students who choose academic employment will work on research and other academics-related projects. Those that

⁷ The Petitioner seeks all research assistants working on any type of grant, whether internal or external. The Petitioner does not seek any research assistant that is funded by a foreign government.

⁸ These positions are only open to students and not to other employees of the Employer or to the public.

⁹ For the 2010-2011 school year, 420 GSET positions were budgeted for the academic track, while 135 were budgeted for the administrative track.

choose the administrative track will work on administrative and academic departmental support such as general administration, clerical duties and front desk positions. The vast majority of GAs work in the department in which they will receive their degree. There are three ways that a Masters student can secure a GSET position. The first way is through the student's contacts with faculty members. Some students are identified early on as "exceptional" students. Conversely, some students are identified as lacking in certain skills such as effective communication. These students are singled out for specific GSET positions chosen by faculty. The second avenue through which a student may secure a GSET position is through the electronic listing of job postings called "Polylink." Polylink is maintained by the Career Management Center. However, job postings must be approved by Director Bonilla and Abudi Pye, an academic counselor for GSET. Bonilla and Pye review all the GSET positions in order to ensure that the positions are "meaningful" inasmuch as the positions contribute to the student's overall experience. For example, a position in maintenance was proposed where the student would patrol the facilities to make sure they were clean and orderly. Bonilla and Pye did not feel that such a position would add meaningfully to a student's experience and the position was not approved.

The final way that a student can secure a GSET position is to contact the Graduate Center. One of the Graduate Center's purposes is to make sure that every student who wants a job can get one. Thus, when a student goes to the Graduate Center seeking employment, the Center's staff will work to find that student a job that suits the individual. The Center will place students based upon the student's strengths and weaknesses. For example, some students' understanding of specific topics enables them to help the university see mistakes in its own research or projects. On the other hand, some students might be exceedingly capable academically but lack the ability to effectively communicate their ideas. In both cases, the Graduate Center will try to place the student in a position where they utilize their skills or where they can improve upon their skills.

Once the student secures a GSET position, they must fill out an I-9 form. They also are required to sign and submit the acceptance letter sent to them from the faculty member who sponsored the position to the Graduate Center. The sponsor will also

complete a payroll action form and submit this form along with the I-9 and the acceptance letter to the Human Resources Department for processing. GSET students are paid via the Employer's payroll system.¹⁰ GSET students will also receive an identification badge; that badge says "student" as opposed to "staff."

The faculty member sponsoring the position will become the GAs supervisor. The Employer maintains an "Student Employee Handbook" that contains a "Supervisor/Manager" section. This section informs the supervisor that the student is both an employee and a student. As an employee, the student is afforded certain rights through federal and state laws and by the Employer's own policies. The supervisor must assist the student in utilizing the employment for the betterment of his or her educational experience. The supervisor is also responsible for making sure the student working in the position is actually performing the duties set forth in the job description. The supervisor ensures that the student remains in good academic standing. Students working on GSET positions must be enrolled as a full-time graduate student and must maintain a GPA of 3.0 or better. If they fail to meet this minimum standard they may be taken off the GSET job. The student can also forfeit the GSET position if they fail to appear for work. However, most disciplinary issues that arise with GSET positions are academic. Students are not supposed to study while they are working in their GSET positions, but some exceptions are made. GSET students are also expected to attend certain mandatory workshops, such as a workshop on presentation skills. Other workshops are made available to GSET students but are not mandatory.

GSET students are paid on an hourly basis. Salaries start at \$10 per hour. Some students may make more, depending upon the position, but students cannot earn more than \$20 per hour. The GSET students are paid directly out of the GSET budget and not from the budget of the department for whom they work. GSET students can work no more than 20 hours per week. Students must track their hours worked and meal breaks by filling out time sheets and submitting them to their supervisors. GSET students are entitled to a fifteen minute break for every four hours worked. Similarly, they are entitled

¹⁰ Director of Human Resources Suong Ives testified that the Employer does not pay unemployment insurance or Workers Compensation insurance for GSET students. She also noted that the GSET students are not covered by the Employer's non-student Employee Handbook. Overall, the Human Resource department has very little responsibility for GAs, TAs, or RAs.

to a 30 minute lunch break if their shift begins before 11 a.m. and lasts more than five hours. Students are not allowed to engage in any other employment.¹¹ GSET students do not receive paid vacations, sick time or holidays. Students must reapply for GSET positions each semester. The majority of students work in GSET positions for one or two semesters.¹²

GSET students work in various positions performing various types of academic and administrative work. For example, for the academic year 2010-2011, jobs posted to Polylink included: 1) an internship with NYU wherein the graduate assistant would assist in biological research with the medical school, 2) a business research position for the BEST center, 3) an Administrative Assistant position for the Graduate Center, and 4) an Instructor/Grader for Engineering Problem Solving and Programming.¹³ Graduate Assistants sometimes work in teams with Research Assistants working on certain research projects.¹⁴ This research may be published by both the Graduate Assistant and the supervising faculty member. Graduate Assistants may also be assigned to work in teaching labs where they assist undergraduate students in carrying out various laboratory experiments. On the administrative side, Graduate Students have been assigned to the applications processing team in the Graduate Center where they assisted the center in creating technology to filter the thousands of student applications the Employer receives each year.

b. Teaching Assistants

There are about 200 full-time PhD students. Of this total number, the Employer utilizes about 25 students as Teaching Assistants (“TA”) each year. If granted a teaching assistantship, the student will receive an appointment letter from the Employer informing them that they have been offered the position. That letter sets forth the amount of the stipend that the student will receive and informs the student that they must maintain full

¹¹ There is no such limitation for non-student employees.

¹² An analysis performed by the HR department of GSET enrollment from Fall 2008 through Spring 2011 shows that about 36% of GSET students were employed for just one semester, 38% worked for 2 semesters, 17% for 3 semesters, and 8 percent for four semesters.

¹³ It is unclear from the record whether all of these positions received official approval from Bonilla and Pye.

¹⁴ For example, doctoral student Sujit Purushothaman testified that he worked with both Graduate Assistants and other Research Assistants on a project funded by Con Edison.

academic status in order to retain the assistantship. The letter also informs the student that they must allocate approximately 20 hours per week to the work required by the assistantship. These TAs generally do not teach courses.¹⁵ Rather, they predominantly work in teaching labs. In the teaching lab, the assistants assist undergraduate students with lab experiments. Some Teaching Assistants might perform grading work for the professor as well.

Generally, each of the teaching labs has a number of prescribed experiments that the undergraduate students must perform throughout the course of a semester. To this end, the students will convene to perform these experiments either once per week, or once every other week. At the beginning of the semester, the faculty in charge of the lab will mentor the TAs and explain to them their responsibilities and how the lab normally functions. Each TA then assumes the responsibility of supervising various groups of these students. The TA may sometimes begin the experiment by quizzing students on the experiment itself to make sure the students are prepared. The TAs make sure all the necessary equipment for the experiment is available and in working order. The TAs do not normally set the experiment up for the students, but rather, guide the students through the experiment. They advise the students through the course of the experiment to ensure the proper steps are taken and that the experiment is performed safely. The TA will also field questions from students during the experiment. After the experiment is completed, the students will write a lab report detailing the course of the experiment which is then graded by the TA. The TAs will then dismantle the equipment, store the equipment, and prepare the lab for the next set of experiments. Depending on the department, the faculty member in charge of the lab will either stay for the entire lab or just a few minutes, leaving the TA in charge.

TAs receive a stipend for the nine-month academic year, plus 18 credits of tuition remission.¹⁶ The stipend for students who have not yet passed their qualifying exam is \$2,125 per month. For students who have passed their qualifying exam, the amount increases to \$2,450-\$2,475 per month. Teaching Assistants are also provided with health

¹⁵ The record revealed one exception: doctoral candidate and research assistant Sujit Purushothaman testified that he does teach a course usually during the fall semester. He testified that he gets paid separately for this work and that it is not a part of his PhD program.

¹⁶ The tuition remission funds are not taxed. However, the stipend the student receives is taxed. Depending upon the national origin of the student, some amount of the stipend may be tax exempt.

insurance. The stipend for the TAs is funded by the Employer's operating budget. Personnel Action Forms are filled out and submitted to the Employer's Human Resource department on behalf of the TAs. The TAs are then paid through the Employer's Human Resources payroll system. Taxes are deducted from the Assistants' pay. TAs do not receive paid vacations, sick days or holidays. TAs are not required to fill out time sheets.

Teaching assistantships generally last for just one year.¹⁷ At the end of the first year, the PhD student takes his or her qualifying examination. If they pass, the student becomes an official PhD candidate and will then be paired with a faculty advisor to begin his or her thesis research. This normally means that the student will become a Research Assistant. The Employer tries to financially support all PhD students so that the student can focus on his or her research. To that end, the vast majority of PhD students are compensated as Teaching Assistants or Research Assistants. The remainder are funded by foreign governments with funds paid directly to the student. Only one or two students are completely unsupported.

The Employer's witnesses testified that the work performed by TAs broadens the student's expertise and experience. Working as a TA in a lab as opposed to being a student in the lab, gives the TA a new vantage point from which to view the experiment and thereby broadens their educational background. Working as a TA also prepares students for careers in academia.

c. Research Assistants

As discussed, after a PhD student completes his or her first year, they are administered a qualifying exam. If they pass that exam they are considered PhD candidates and can select their dissertation committee with the assistance of their research advisor. The student must then choose a dissertation research project. Six months after the written qualifying exam, the student will give the dissertation committee an oral presentation on his or her proposed research topic. The committee will ask the student questions to test that student's knowledge of the research topic. If the student passes this oral exam, they continue with their research as a Research Assistant ("RA"). The student

¹⁷ A teaching assistantship may last for more than one year if the student cannot secure funding for their dissertation research. In at least one instance, a student served a second year as a Teaching Assistant because no funding was available for his chosen research project.

will receive an appointment letter from the Employer informing them that they have been offered a research assistantship. That letter sets forth the amount of the stipend and informs the student that they must maintain full academic status. The letter also states that the RA must allocate 20 hours per week on assigned tasks pursuant to the assistantship.¹⁸

The Employer supports about 130-150 Research Assistants each year. These RAs are generally performing original research for their doctoral theses.¹⁹ Doctoral students need at least 36 research credits to complete their PhD; many students surpass that amount. Thus, RAs performing original research for their dissertations receive credit for that work in addition to remuneration. In most cases, RAs will be working on only a portion of a broader research project sponsored by a faculty member who secured funding through a grant. That faculty member is known as the Principle Investigator, or “PI.” It appears to take about one year for a grant to be awarded after the PI submits his or her proposal. After the grant is awarded, the PI will choose which students will serve as Research Assistants on his or her project. The PI will be responsible for ensuring that the work set forth in the grant is accomplished. Doctoral student and Research Assistant Harold Han testified that his research team meets with the PI on his project every Monday. In addition, Han explained that he attends two center meetings a year where “spotters,” or potential financial contributors, are presented with research Han’s team performed the previous semester. The spotters then consider if they wish to contribute funds to the project.

The Research Assistant normally works on a team which includes the PI, possibly a co-principle investigator, post doctoral fellows or associates. There also may be technicians working on the team if the research involves use of major instrumentation.

¹⁸ Kurt Becker, Associate Provost for Research and PhD Programs, testified that PhD students typically spend more than 20 hours per week on their thesis research.

¹⁹ Doctoral student Sujit Purushothaman testified that he works on research projects other than his thesis project. He explained that after publishing a paper in a recognized journal as required by his dissertation thesis, he still had credits to satisfy. Thus, he decided to diversify his research beyond what he had published. Kurt Becker testified that it is uncommon for Research Assistants to work on research projects other than the student’s thesis research project. Doctoral Student Harold Han testified that in addition to performing research for his thesis project, he is also in charge of maintaining the lab’s “GC Mass” equipment. He testified that all PhD students have the responsibility of maintaining specific pieces of equipment.

The grant funds the salaries of these individuals,²⁰ which salaries are paid to them on a bi-monthly basis.²¹ Occasionally, the grant provides for funding for undergraduate students and administrative and clerical support.²²

Research Assistants receive a stipend for the academic year and for the summer. The amounts they receive are the same as discussed for Teaching Assistants: \$2,125 per month pre-qualifying exam, and \$2,450-\$2,475 per month post-exam. The Employer must fill out a “Personnel Action Form” for each RA and submit that form to the Employer’s Human Resources department in order for the student to get paid.²³ Research Assistants also receive tuition remission. However, as the student progresses in their PhD program, the amount of remission decreases because the student does not need to surpass 75 credits. As with TAs, the tuition remission is not taxed, but the stipend is taxed. Research Assistants do not receive paid vacation, sick days or holidays.

Funding for the research assistantships comes almost exclusively from external grants and contracts. These grants and contracts are researched and secured with the help of the Employer’s Office of Sponsored Research. This department brings funding opportunities to the attention of faculty members. It then assists faculty in drafting grant proposals and putting together research budgets. The office has the ultimate authority in signing off on the proposed budget prior to submission. The Employer has a “three tier” grant structure. The first type of grant is a federal government grant which would be labeled as a “40XXX” grant.²⁴ The second type is a 41XXX grant. The “41” signifies that the funding comes from a state, city, or municipal agency. Lastly, there are 42XXX grants that come from industry or private sponsors. Seventy to eighty percent of the Employer’s grants come from federal agencies and are thus “40XXX” grants. The

²⁰ The grant application appears to list RAs salaries as “other personnel” costs.

²¹ Facilities and Administration (F&A) costs, such as utilities, are also covered by the grant.

²² Graduate Assistants are sometimes assigned to these teams; however, their funding does not come from the grant.

²³ Suong Ives, Human Resource Director, pointed out that the Human Resources department has very little responsibility for GAs, TAs, or RAs.

²⁴ About sixty percent of these 40XXX grants come from the National Science Foundation. The other forty percent come from agencies such as the Army Office of Research, Air Force Office of Scientific Research, Office of Naval Research, Defense Advanced Research Project Agency or DARPA, National Institute of Health, and the Department of Education.

funding received from these grants is awarded to the university.²⁵ Faculty and students working on the grant receive their salaries through the Employer's payroll department.

The Employer maintains certain policies and procedures for contracts and grants administration. Those policies are contained in "Section 25 of Polytechnic University Policies and Procedures for Grants and Contracts Administration." Those policies provide that the university and the Principle Investigator must ensure that the individuals listed as working on the grant are in fact doing work to fulfill the objectives of the grant. The policies also require the employer to submit time and effort reports to the funding agency multiple times each year detailing the percentage of time spent on the project by all participants.

With regard to the end result of doctoral students' research projects, Associate Provost for Research and PhD Programs Kurt Becker testified that like all universities the Employer tries to reap some benefit from its own research breakthroughs. One of the main goals of the Employer's faculty members is to produce original research. The Employer then looks to see how it can create economic value from its research. In that regard, the Employer requires that RAs sign a patent policy agreement. This agreement gives the Employer the right of first refusal on research breakthroughs. The Employer decides whether to assume the rights to the invention or idea or return the rights to the inventor. The Employer has secured patents based upon research performed by Research Assistants. Income received from patents is one of the ways the Employer can improve its financial stability.

DISCUSSION

The Board in Brown University, 342 NLRB 483 (2004), held that graduate assistants are primarily students and have a primarily educational, and not economic relationship with their university. In so deciding, the Board emphasized that the petitioned-for individuals had to be enrolled at Brown to be awarded an assistantship. The majority further highlighted the fact that the assistants' principle time commitment was

²⁵ According to a page taken from fiscal year 2010's financial statement, the Employer received over \$14 million dollars in grant and contract funding from federal, state, local, and private sources combined.

focused on obtaining a degree. The Board thus decided to return to its pre- New York University (NYU I) 332 NLRB 1205 (2000) precedent, inaugurated in the early 1970's, which held that graduate assistants were not statutory employees. Noting how the policy considerations set forth in the pre-NYU I line of cases are just as relevant today as they were 25 years ago, the Brown majority determined that graduate assistants are not employees within the meaning of Section 2(3) of the Act and dismissed the petition.

The record developed herein uncovered evidence that supports both the conclusion that the petitioned-for individuals have an academic relationship to the university and that the individuals have an economic relationship with the university. Similar to the facts of Brown, all three classifications of assistantship, require enrollment as a full-time student in order to be awarded the assistantship. It is clear from the record that all three assistants perform work related to their respective courses of study. In the case of RAs, this research is required in order to receive their doctorate. The RAs perform research almost exclusively for their doctoral dissertations. TAs perform work that sharpens both their laboratory skills and teaching skills. The record demonstrated that GSET students are generally appointed to positions within their department of chosen study, which positions are specifically designed to enrich the student's overall educational experience. All three classifications work under the auspices of a faculty advisor. Thus, these graduate assistants clearly have an academic relationship with the university.

However, the record also revealed evidence that tends to show that all three classifications also have an economic relationship with the Employer. All three classifications perform work for the university that benefits the university. Graduate Assistants work throughout all departments of the Employer assisting faculty members and staff in performing their duties for the Employer. For example, evidence was adduced that showed that GAs in the Graduate Center developed technology to assist the Employer in its efforts to filter through the thousands of applications it receives each year. Similarly, it was revealed that some GAs assist faculty members in their research projects. Teaching Assistants' work benefits the university by helping faculty members teach laboratory courses.

Although Research Assistants generally perform research for their own doctoral theses, this research constitutes a small portion of an overall research project sponsored by a faculty member. As a self-proclaimed “high quality research university,” one of the Employer’s main products is original research. This product is so valuable that the Employer retains the right of first refusal on patents for all research breakthroughs. Consequently, the overall projects on which RAs work, are a valuable commodity to the Employer. Thus, the argument can be made that the RA is providing a valuable service to the Employer inasmuch as they assist faculty members in research projects that benefit the university.

The record revealed other indicia of an economic relationship. All three classifications of assistant are compensated for their work. Although the stipends to TAs and RAs appear to remain constant, GSET students are paid at discretionary rates between \$10 and \$20 per hour. All three classifications are paid via the Employer’s payroll system and must pay income taxes on their compensation. GSET students are required to submit time sheets. RAs must also report, albeit indirectly, on time and effort expended under the research grant. All three are supervised by faculty members who must ensure that the students are performing the work set forth either in the job description or the grant proposal.

Considering all the evidence, it would appear that the balance of the evidence still weighs in favor of a conclusion that the petitioned-for unit has more of an academic relationship to the university than economic. Given that regional directors are bound by Board precedent I must find that the Graduate Assistants, Teaching Assistants, and Research Assistants petitioned-for herein are not statutory employees under the Board’s holding in Brown, supra.²⁶

The Employer argues that even if the Brown decision is reversed, the petition should be dismissed because the Board has held in cases other than Brown that RAs working on externally funded grants are not employees under the Act, and because GAs and TAs are temporary employees. The Employer asserts that under the Board’s decisions in Leland Stanford Jr. University, 219 NLRB 621 (1974) and New York

²⁶ Although the Petitioner argues that the Board’s Order in New York University (NYU II) 356 NLRB No. 7 (2010), directs Regional Directors not to apply Brown in a categorical manner, that Order did not overrule the Brown decision. Thus, I am still bound by the holding in that decision.

University (NYU I) 332 NLRB 1205 (2000), RAs that perform research under externally funded grants are not employees under the Act. The Employer's argument has merit.

In Leland Stanford, the Board found that research assistants performing research in satisfaction of their doctoral thesis who received funding from external grants (such as federal government grants) were not employees under the Act. The Board stated, "...we are persuaded that the relationship of the RAs and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer." Leland Stanford, 219 NLRB at 623. Similarly, in NYU I the Board found, "...we agree that the Sackler graduate assistants and the few science department research assistants funded by external grants are properly excluded from the unit...The evidence fails to establish that the research assistants perform a service for the Employer and, therefore, they are not employees as defined in Section 2(3) of the Act." (NYU I) 332 NLRB at fn 10.

Based on the language in these cases, it would appear that should the Board decide to overrule the Brown decision, the RAs involved herein would still not be considered employees under the Act. Like the RAs in both Leland Stanford and NYU I Polytechnic's RAs are performing work funded not by the university itself, but by outside sources, particularly the federal government. It is true that the research work they perform is required for receipt of their degree and they receive academic credit for engaging in this research. However, like the RAs involved in Leland Stanford and NYU I, Polytechnic's RAs do not seem to perform work directly for this Employer. I note that an argument could be made that the Polytechnic RAs perform work indirectly for the Employer inasmuch as they work on portions of research projects engaged in by the Employer's faculty members. In this sense, the RA is actually assisting the Employer in carrying out research which, as noted earlier, can benefit the Employer in the form of marketable patents. Furthermore, unlike the RAs in Leland Stanford, Polytechnic RAs stipends are taxed and an RAs time and effort expended on the project is monitored and reported by the Employer. Nonetheless, the balance of the evidence weighs in favor of a finding that the RAs herein would be excluded from any determined unit under the decisions in Leland Stanford and NYU I.

Finally, the Employer argues that regardless of the Board's decision on the viability of Brown, the petition should be dismissed because the Employer's GAs and TAs are temporary employees, and not entitled to collective bargaining rights under the Act. The Employer asserts that because the record revealed that the majority of GAs and TAs hold their position for no more than one year, these employees have no substantial expectancy of continued employment and should be excluded from the unit. In support of this position, the Employer points to the decision in NYU I. In that case, the Regional Director therein found that student graders and tutors who worked anywhere from one week to one semester, who had no expectation of receiving a string of assignments or the same assignment one semester after another, were temporary employees and excluded from the unit. In evaluating this contention, I would note initially that no party requested review of this finding by the regional director and therefore the Board did not pass on this issue. Second, the record developed in the instant case shows that both GAs and TAs have a reasonable expectation of employment from one semester to the next. The record revealed that both teaching and graduate assistantships generally last for two semesters. And, testimony was adduced that showed that 25% of GAs work for 3 or more semesters. Further, the record testimony was that a TA may work additional semesters if they cannot secure funding for their research.

The Employer also points to the holdings in Saga Food Service of California, 212 NLRB 786 (1974) and San Francisco Art Institute, 226 NLRB 1251 (1976) to support its assertion that the Board has historically denied collective bargaining rights to student workers because the students "are best likened to temporary or casual employees." In my view, the Employer's reading of these cases is too narrow. In both cases, the Board was confronted with the question of whether student workers could be included in a unit with full-time and/or regular part-time non student workers. In both cases, the Board found that there was not a sufficient community of interest to include the student workers in the bargaining unit.²⁷ The Employer does not argue here that GAs, TAs, and RAs do not share a community of interest. Neither case directly dealt with the question of whether

²⁷ In both cases, the petitioner asked the Board to direct an election in an alternative unit of student workers only. In both cases, the Board decided that it would not "effectuate the purposes of the Act" at that time to direct an election in the alternate unit. I find this statement was not intended to be considered as determinative of the efficacy of such a unit or the 2(3) status of the individuals involved.

student workers should be afforded collective bargaining rights given the temporary nature of their employment. Thus, I find those cases to be inapposite of the issue involved herein.

I also note that recently, in Kansas City Repertory Theatre, Inc., 356 NLRB No. 28 (2010), the Board found that musicians who worked intermittently, sometimes for just a matter of weeks in one year, are entitled to collective bargaining rights. The Board stated, “The logical consequence of the Employer’s argument is that temporary or intermittent employees cannot exercise the rights vested in employees by Section 9 of the Act. However, no such exclusion appears in the definition of employee or elsewhere in the Act. Although the employees in the petitioned-for unit work intermittently, in many industries employees with little or no expectation of continued employment with a particular employer engage in stable and successful collective bargaining—for example actors, and construction workers... We believe the Act vests in employees, rather than in the Board, the decision whether they will benefit from collective bargaining.” Here, both GAs and TAs work far more than just a few weeks in one year. The majority of these students work an entire academic year, with the real prospect of continued employment the following semester. Consequently, I do not find that the petition should be dismissed regarding the GAs and TAs on the basis that they are temporary employees.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, the undersigned finds and concludes as follows:

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated that Polytechnic Institute of New York University, a not-for-profit corporation, with its main campus located in Brooklyn, New York, is an institution of higher education. Annually, in the course and conduct of its operations the Employer derives gross revenues in excess of \$1 million dollars and purchases and receives goods and supplies valued in excess of \$50,000 at its New York facility directly from suppliers located outside the State of New York.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here.

3. The parties stipulated that International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America, UAW ("UAW") is a labor organization within the meaning of 2(5) of the Act.

4. A question affecting commerce does not exist concerning the representation of certain employees of the Employer within the meaning of Sections 9(c) and 2(6) and 2(7) of the Act.

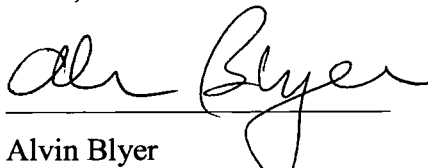
ORDER

Accordingly, it is hereby ordered that the petition in Case No. 29-RC-12054 be, and it hereby is, dismissed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 for the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington D.C. 20507-0001. This request must be received by the Board in Washington by 5:00 pm EST on September 13, 2011. The request may be filed electronically through E-Gov on the Agency's website www.nlr.gov,²⁸ but may not be filed by facsimile.

Signed at Brooklyn, New York, August 30, 2011.

A handwritten signature in black ink, appearing to read "Alvin Blyer", is written over a horizontal line.

Alvin Blyer
Regional Director, Region 29
2 Metrotech Center, 5th Floor
Brooklyn, NY 11201

²⁸ To file the request for review electronically, go to www.nlr.gov and select the E-Gov tab. Then click on the E-Filing link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter, and is also located under "E-Gov" on the Agency's website.